No. 78-1261

# In the Supreme Court of the United States

OCTOBER TERM, 1979

NORMAN A. CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL., PETITIONERS

*v.*

MARIE GREEN, ADMINISTRATRIX OF THE ESTATE OF JOSEPH JONES, JR.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

WADE H. McCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

## INDEX

### CITATIONS

Page

Cases—(Continued):





Page

Constitution and statutes:

# In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1261

NORMAN A. CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL., PETITIONERS

*v.*

MARIE GREEN, ADMINISTRATRIX OF THE ESTATE OF JOSEPH JONES, JR.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

1. In our opening brief (pages 15-24), we showed that where Congress has provided an adequate statutory remedy, there is no justification for the courts to create a constitutional damages action such as that recognized in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Although respondent acknowledges that Congress may substitute a legislative remedy for constitutional damages actions, she claims (Br. 16-17) that, unless Congress has manifested an affirmative intent to make an available statutory remedy exclusive, the Constitution compels a judicially-implied cause of action.[1] This Court has repeatedly emphasized, however, that the existence

[1]The linchpin of respondent's argument is that *Bivens* actions are a matter of "constitutional compulsion" (Resp. Br. 16 n.15). But the Court's opinion in *Bivens* expressly rejects this notion. The Court weighed a number of considerations in implying a constitutional

of an effective federal statutory remedy, whether or not intended by Congress to be exclusive, may well eliminate the need for a *Bivens*-type remedy. See, *e.g.*, *Davis* v. *Passman*, No. 78-5072 (June 5, 1979), slip op. 19; *id.* at 1 (Powell, J., dissenting) (matter of "principled discretion"); *Bivens* v. *Six Unknown Named Agents*, *supra*, 403 U.S. at 396-397; see also Comment, *Loe* v. *Armistead*: *The Availability of an Alternative Remedy as a Bar to Extending Bivens*, 20 Wm. & Mary L. Rev. 393 (1978).[2]

For example, the Civil Rights Acts, 42 U.S.C. 1981 *et seq.*, were enacted a century before this Court first implied a constitutional tort remedy in *Bivens*. Accordingly, the Congress that passed the Civil Rights Acts could hardly have intended those statutes to exclude an

---

cause of action in that case, including "special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. The Court recently reiterated these considerations in *Davis* v. *Passman*, No. 78-5072 (June 5, 1979), slip op. 16-20. Such considerations "would not be permissible, of course, were the *Bivens* result a constitutional necessity." *Molina* v. *Richardson*, 578 F. 2d 846, 850 (9th Cir. 1978).

[2]To be sure, where Congress has manifested an explicit intent to establish an exclusive remedy for particular kinds of complaints, the *Bivens* remedy is unavailable. See *Brown* v. *General Services Administration*, 425 U.S. 820 (1976). Indeed, if Congress enacts an exclusive remedy, *all* other remedies, including those provided by other federal statutes and state tort law, are preempted. The question posed here, however, is whether in the absence of such congressional intent, the Court is compelled to create a *Bivens*-type action. Cf. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, No. 77-1645 (Nov. 13, 1979), slip op. 6-7. Respondent's discussion (Br. 37-39) of legislation now pending in Congress is therefore irrelevant. Even if the government is successful here, it will continue to support the proposed legislation because there are many constitutional torts that do not fall within the existing scope of the Federal Tort Claims Act and because an exclusive FTCA remedy would also preclude suits against federal officers based on state tort law or other federal statutes.



alternative damages remedy based directly on the Constitution—a remedy of which they were unaware. Nonetheless, the courts of appeals have consistently refused to recognize a constitutional damages action in those circumstances in which the Civil Rights Acts constitute an adequate statutory remedy. See, *e.g.*, *Turpin* v. *Mailet*, 591 F. 2d 426, 427 (2d Cir. 1979) (en banc) (42 U.S.C. 1983); *Molina* v. *Richardson*, 578 F. 2d 846, 850-853 (9th Cir. 1978) (42 U.S.C. 1983); *Mahone* v. *Waddle*, 564 F. 2d 1018, 1024-1025 (3d Cir. 1977) (42 U.S.C. 1981). See also *Monell* v. *Department of Social Services*, 436 U.S. 658, 712-713 (1978) (Powell, J., concurring). It is thus apparent that the availability of a *Bivens*-type remedy in a particular circumstance does not depend on Congress' intent to make an available statutory remedy exclusive, but rather is a matter of "principled discretion" for the courts, dependent upon the adequacy and comprehensiveness of the existing statutory remedy.[3]

---

[3]Amicus Lawyers' Committee for Civil Rights Under Law contends (Amicus Br. 10-11 & n.11) that the Court should dismiss the writ in this case as improvidently granted. We note that respondent has not joined in this suggestion (see Resp. Br. 11 n.5). In any event, amicus is incorrect in its assertion that the government failed to raise the *Bivens* issue in *Moffitt* v. *Loe*, No. 78-1260, the Fourth Circuit case that is being held pending resolution of this case. The plaintiff in *Moffitt* v. *Loe* filed both a constitutional claim and a Federal Tort Claims Act suit, and the government's petition for rehearing in the court of appeals presented the precise theory discussed in point I of our opening brief. See Petition on Behalf of the Federal Appellees for Rehearing In Banc at 4-7, *Loe* v. *Armistead*, 582 F. 2d 1291 (4th Cir. 1978). Accordingly, the government did properly raise the *Bivens* issue "prior to the petition for certiorari." *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380 (1935); see *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977). (We are lodging a copy of the rehearihg petition in *Loe* with the Clerk of this Court.)

2. Respondent also raises several challenges to the adequacy of the Federal Tort Claims Act as an alternative statutory remedy. In essence, respondent asserts that because the remedy afforded by the FTCA differs in certain respects from the cause of action recognized in *Bivens*, and because the FTCA remedy nominally applies to "torts" rather than "constitutional violations," she is entitled to sue under either the FTCA or the Constitution, or both. The relevant question, however, is not whether the FTCA constitutes a remedy identical to that provided in *Bivens*, but whether the FTCA adequately compensates the victims of unlawful governmental conduct. Moreover, as a recent commentator has observed:

> By focusing on the right violated, the injury suffered tends to be overlooked. If that injury can be compensated within the existing remedial framework provided by Congress, then, accordingly, the violation of the victim's constitutional right has been redressed. To ignore this rationale would condone an entirely new set of judicially created collateral remedies, to the exclusion of those provided by Congress, because a constitutional right allegedly has been violated.

Comment, *supra*, 20 Wm. & Mary L. Rev. at 403 n.65. See also *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976) (characterizing constitutional damages actions under 42 U.S.C. 1983 as "a species of tort liability").

At least in the context presented here, the FTCA provides a comprehensive remedy obviating the need for the courts to imply another, redundant one. Every state allows suits for medical malpractice, and the Federal Tort Claims Act has long been construed to permit compensation for injuries such as those allegedly suffered



by respondent's son. See, *e.g.*, *United States* v. *Muniz*, 374 U.S. 150 (1963). Furthermore, as we demonstrate below, the differences between this statutory remedy and a *Bivens*-type action catalogued by respondent are insubstantial or nonexistent.[4]

First, respondent asserts (Br. 18) that "[t]he most compelling evidence of the inadequacy of the FTCA" is that Indiana law (as incorporated under the FTCA) would limit or abate her tort claim.[5] But the success or

---

[4]In fact, a suit against the federal government based on a medical malpractice rationale is generally a far preferable remedy to a constitutional damages action against defendants such as prison guards, who may be judgment proof. See note 8, *infra*.

Respondent observes (Br. 10 n.4) that her complaint alleges that her son's death was the result of race discrimination, in violation of the Fifth Amendment, as well as deliberate indifference to serious medical needs, in violation of the Eighth Amendment (A. 12-13). Because the FTCA encompasses both prison medical malpractice (whatever the motivation) and the intentional torts of correctional officers, the statute appears to afford a remedy for respondent's particular equal protection claim. Of course, if an alleged constitutional tort does not fall within the scope of a federal remedial statute, then recognition of a *Bivens*-type action would ordinarily be appropriate. See *Davis* v. *Passman*, *supra*. In any event, the government's petition for a writ of certiorari expressly concerned only respondent's Eighth Amendment claim.

[5]Under Indiana law, all actions survive except personal injury actions in which the victim dies from the injuries inflicted. See Ind. Code Ann. § 34-1-1-1 (Burns 1973). As to such personal injury actions, Indiana instead provides a remedy for wrongful death. See Ind. Code Ann. § 34-1-1-2 (Burns 1973). The wrongful death action, although not technically a survival action, shares many of the same characteristics. See Note, *Wrongful Death Actions in Indiana*, 34 Ind. L.J. 108, 114-115 (1958); *In re Estate of Pickens*, 255 Ind. 119, 126-127, 263 N.E. 2d 151, 155-156 (1970); *City of Indianapolis* v. *Willis*, 208 Ind. 607, 613, 194 N.E. 343, 346 (1935). More important, it provides full compensation for tortious conduct causing death. Indeed, in many circumstances a wrongful death action may lead to a more favorable recovery. In personal injury cases in which the victim dies of causes other than the injury, the Indiana survival

failure of an individual suit is not an appropriate basis for extending the *Bivens* decision. Rather, as the Court's analysis in *Bivens* makes clear (403 U.S. at 394-397; *id.* at 407-410 (Harlan, J., concurring)), the critical inquiry is whether implication of a constitutional damages action is necessary to protect the class of claimants in question. See also *Davis* v. *Passman*, *supra*, slip op. 11 n.18. Because the FTCA fully covers in-prison medical malpractice whether or not such medical inattention also violates the Eighth Amendment, the fact that respondent's individual claim might fail is an insufficient reason for implying an additional constitutional cause of action. Moreover, as we have explained in point II of our opening brief, respondent's *Bivens* claim is in any

---

statute allows the recovery of "only the reasonable medical, hospital and nursing expense and loss of income * * * from the date of the injury to the date of his death" (Section 34-1-1-1). In contrast, the Indiana wrongful death provision states that in most instances "damages shall be in such an amount as may be determined by the court or jury, including, *but not limited to*, reasonable medical, hospital, funeral and burial expenses and lost earnings" (Section 34-1-1-2) (emphasis supplied). Of course, where, as here, the decedent is not survived by a spouse, child or dependent relative, the wrongful death recovery is more limited.

Respondent contends that her lawsuit is a survival action governed solely by Section 34-1-1-1 and that therefore Indiana law defeats her claim completely. Respondent's complaint states, however, that this suit is brought both on behalf of her son's estate and also on behalf of respondent as next of kin (A. 7-8). In addition, under Indiana law an administratrix is the proper party to bring either a survival or a wrongful death action. See, *e.g.*, *Indiana State Highway Comm'n* v. *Speidel*, 392 N.E. 2d 1172, 1176 (Ind. Ct. App. 1979); *The Jeffersonville R.R.* v. *Swayne's Administrator*, 26 Ind. 477 (1866). In any event, so long as Indiana, like other states, provides a mechanism for the recovery of damages on account of death caused by unlawful behavior, it seems irrelevant to the issues posed by this case whether Indiana denominates such a claim as a survival action or a wrongful death action or whether respondent has chosen to forego an available avenue of relief.



event controlled by the same provisions of Indiana survival law that govern her suit under the Federal Tort Claims Act.

Second, respondent contends (Br. 22-26) that judicial implication of a *Bivens*-type remedy is warranted here because punitive damages and jury trials are unavailable in FTCA suits. The right to jury trial, however, relates merely to the procedure of adjudication, not to the fairness or completeness of the compensation that may ultimately be awarded to a successful litigant. Respondent does not, and could not, plausibly assert that all remedial schemes excluding the right to jury trial are inadequate.[6] Judges are empowered to render the same damages awards as juries.

By the same token, even assuming that punitive damages are available in *Bivens*-type actions,[7] they are not an essential attribute of an adequate compensation scheme. The primary purpose of a constitutional damages action is to compensate the victim of wrongful government conduct. See *Bivens* v. *Six Unknown Named Agents*, *supra*, 403 U.S. at 397; *id.* at 407-408 (Harlan, J., concurring). An award of compensatory damages is,

---

[6]Moreover, as we noted in our opening brief (pages 30-31 n.30), juries have exhibited substantial reluctance to award damages to prisoners in suits against government officials. See Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 788-809 (1979); Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. Legis. 1, 2-3 (1979); Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L.J. 447, 456-457 (1978).

[7]Compare *Holodnak* v. *Avco Corp.*, 514 F. 2d 285, 292 (2d Cir.), cert. denied, 423 U.S. 892 (1975), with *Hanna* v. *Drobnick*, 514 F. 2d 393, 398 (6th Cir. 1975). See also *Carey* v. *Piphus*, 435 U.S. 247, 257 n.11 (1978) (reserving question whether punitive damages are available under 42 U.S.C. 1983).

by definition, sufficient to compensate a plaintiff for injuries caused by unlawful conduct, and there is no dispute that compensatory damages are fully available under the FTCA. "Punitive damages" on the other hand, " 'are not compensation for injury.' " *International Brotherhood of Electrical Workers* v. *Foust*, No. 78-38 (May 29, 1979), slip op. 6 (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). A plaintiff has no constitutional right to obtain punitive damages, and Congress (or, absent congressional guidance, this Court) could eliminate that type of relief, even for constitutionally-based claims. See *International Brotherhood of Electrical Workers* v. *Foust*, *supra*, slip op. 10. Cf. *Lockerty* v. *Phillips*, 319 U.S. 182, 187-188 (1943). Hence, the absence of a punitive damages possibility does not render a compensation scheme inadequate as a matter of law.

Moreover, punitive damages are not essential as a means of deterring official misconduct. Compensatory damages have a substantial deterrent effect. As the Court recently remarked in *Carey* v. *Piphus*, 435 U.S. 247, 256-257 (1978), "[t]o the extent that Congress intended that [damage] awards under [42 U.S.C.] 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." In addition, although under the FTCA it is the United States and not the misbehaving official that is named as the defendant and that would pay any adverse judgment, the individual wrongdoer does not escape without sanctions. It is the individual government employee's conduct that is the focus of the FTCA proceeding, and any employee whose conduct results in



damages liability for the United States faces the possibility of disciplinary action, including dismissal.[8]

Finally, respondent claims (Br. 27-29) that the defenses and administrative procedures set forth in the FTCA somehow prohibit "full compensation." But the due care and discretionary function defenses found in 28 U.S.C. 2680(a) are essentially equivalent to the qualified immunity defense that would be available in a *Bivens* action. See *Butz* v. *Economou*, 438 U.S. 478 (1978).[9] In

---

[8]We explained in our opening brief (pages 37-41) that the substitution of governmental for individual liability often results in more significant long-term deterrence of misconduct. See *Turpin* v. *Mailet*, 579 F. 2d 152, 165 (2d Cir.) (en banc), vacated, 439 U.S. 974 (1978), modified on other grounds, 591 F. 2d 426 (1979); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922, 927 (1976). Indeed, contrary to respondent's assertion (Br. 21), we believe it is far more likely that government officials will acknowledge wrongdoing, settle lawsuits, and take vigorous corrective action when a suit implicates the liability of the government and not the finances of the officials themselves. See Newman, *supra*, 87 Yale L.J. at 457 ("Providing for suit directly against the * * * government would * * * enhance the prospects for deterrence by placing responsibility for the denial of constitutional rights on the entity with the capacity to take vigorous action to avoid recurrence"). We also note that the possibility of punitive damages, whatever its efficacy in theory, is a "rather hollow remedy" in practice, both because it is rarely imposed and because many government officials could not satisfy a large judgment. See S. Rep. No. 93-588, 93d Cong., 1st Sess. 3 (1973); Comment, *supra*, 20 Wm. & Mary L. Rev. at 410-411.

[9]Respondent misconstrues (Br. 26) the scope of the two FTCA defenses. The government, like the individual defendants in a *Bivens* suit, is not liable where its agents exercise due care in following a statute or regulation. Moreover, although there may be circumstances outside of the prison medical malpractice context in which the discretionary function exemption would absolve the government of liability when an individual defendant would be held liable, no court has ever suggested that the discretionary function defense applies to the planning and execution of a program designed to deprive citizens of their rights. Respondent's exaggerated claim on this point simply ignores the 1974 amendments to the FTCA. See 28 U.S.C. 2680(h); S. Rep. No. 93-588, *supra*, at 2-3.

addition, the administrative claim requirement of the FTCA is hardly a "useless act" (Resp. Br. 27). As we discussed in our opening brief (pages 25-26 & n.23, 30 n.29), the legislative history of the FTCA clearly reflects Congress' considered view that the administrative claim procedure serves to lessen court congestion, to relieve the Department of Justice of defending against unnecessary litigation, and to mitigate the delays in settling meritorious claims equitably. Actual experience under the FTCA supports this congressional understanding. For example, we are informed that in the latest nine-month period, the north central region of the Bureau of Prisons (which includes Indiana) has settled 65 out of 158 FTCA claims at the administrative level.[10]

3. Respondent contends (Br. 41-43) that federal common law and not state law controls the survival of constitutional damages actions. However, respondent does not disclose the precise contours of this federal law, such as who may sue, who is entitled to share in the recovery, when suit must be brought following the decedent's death, or what monetary limits, if any, are imposed on recovery. Because these kinds of questions are more legislative than judicial in nature, and because such questions implicate traditional state law concerns, this Court has repeatedly declined to create such rules as a matter of federal common law and has instead adopted appropriate state law. See, *e.g.*, *Robertson* v. *Wegmann*, 436 U.S. 584 (1978); *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966).[11] See also *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 405-408 (1970).[12] There is no reason to depart from that salutary rule in this case.[13]

[10]Of course, as mentioned earlier (see note 8, *supra*), the government is far more likely to settle an FTCA claim prior to trial than is an individual officer named as a defendant in a *Bivens* action.



[11]It is noteworthy that respondent repeatedly urges the Court to treat constitutional damages actions as though Congress had extended 42 U.S.C. 1983 to cover federal officials (see, *e.g.*, Br. 20, 23, 27), yet she suggests that the even-handed rule adopted in *Robertson* v. *Wegmann*, *supra*, regarding the survival of Section 1983 actions is somehow inappropriate in the *Bivens* context.

[12]Respondent's extensive reliance (Br. 43-45, 56-57) on *Moragne* v. *States Marine Lines, Inc.*, *supra*, is misplaced. In that case, the Court held only that, as a matter of admiralty law, there is a common law wrongful death action available to the beneficiaries of long-shoremen killed while working aboard a vessel in the navigable waters of the United States. The Court strongly indicated, however, that, rather than creating the elements of this cause of action as a matter of federal common law, the federal courts should simply adopt existing state or federal statutes to supply the missing details, such as who may bring the action. See 398 U.S. at 405-408. The Court remarked that "[b]oth the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades." *Id.* at 408.

[13]Respondent's claims concerning the construction of Indiana law are addressed in note 5, *supra*. We further note that the Indiana statutory scheme is far from unique. Many states in addition to Indiana limit the cause of action for personal injuries causing death or replace it with a wrongful death action. See, *e.g.*, Ariz. Rev. Stat. Ann. § 14-3110 (1975); Cal. Prob. Code § 573 (West Cum. Supp. 1979); Fla. Stat. Ann. § 768.20 (West Cum. Supp. 1979); Ill. Ann. Stat. ch. 70, §§ 1 and 2 (Smith-Hurd 1959 and Cum. Supp. 1979) (*Baird* v. *Chicago, B. & Q. R.R.*, 11 Ill. App. 3d 264, 296 N.E. 2d 365 (1973)); Minn. Stat. Ann. §§ 573.01-573.02 (West Cum. Supp. 1978); Mo. Ann. Stat. § 537.020 (Vernon Cum. Supp. 1979); Neb. Rev. Stat. § 25-1402 (1975); Nev. Rev. Stat. § 41.100 (1977); N.Y. Est., Powers & Trusts Law § 11-3.3 (McKinney 1967); Va. Code § 8.01-25 (1977); W. Va. Code §§ 55-7-5 to 55-7-8a (1966 and Cum. Supp. 1978); Wyo. Stat. § 1-4-101 (1977).

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

WADE H. MCCREE, JR.
*Solicitor General*

JANUARY 1980